of privilege," and that "was not invoked by the department head, but by the attorney for the City," wholly unsupported by affidavits. *Id.* at 225. The court in *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996), merely stated that the head of the agency must conduct a "personal perusal of the matter" without specifying that the official must review documents to determine if they fall within the scope of a privileged matter. Similarly, in *Kerr* v. *United States District Court*, 511 F.2d 192 (9th Cir. 1975), aff'd, 426 U.S. 394 (1976), "[n]either the [heads of the relevant agencies] nor any official of these agencies asserted, in person or writing, any privilege in the district court." *Id.* at 198. Finally, *Douglas* v. *Windham Superior Court*, 597 A.2d 774 (Vt. 1991), is wholly inapposite, as it involved a state official's invocation of the "investigatory files privilege." *Id.* at 776-783.

3. Petitioner also contends (Pet. 24-26) that its patented device is not a secret and has been the subject of various presentations. That contention misses the point. The government has not asserted, and the courts below did not hold, that petitioner's device *itself* is a state secret. Rather, the state secrets at issue pertain to the manufacture or use, if any, of the patented device by or for the government. The court of appeals, which reviewed both the public and the classified declarations submitted in this case, held that "the government claims a legitimate state secret." Pet. App. 12a. Petitioner offers no basis for this Court to disregard the judgment of the Executive Branch that disclosure of the requested information could reasonably be expected to cause "extremely grave damage to national security," C.A. App. 504, as well as the conclusion of the two lower courts that upheld the government's claim of privilege only

after careful consideration of the government's submission.

4. Petitioner also argues (Pet. 27-28) that the court of appeals' remand order violates its right to a jury trial. That contention lacks merit. The court of appeals merely held that before the district court determines whether petitioner can proceed on its state law claims in light of the state secrets privilege, petitioner must identify the trade secrets and contract provision that are allegedly at issue in its lawsuit. Pet. App. 14a-19a. The court observed that although petitioner alleged misappropriation of trade secrets, it had never identified the trade secrets that were at issue. *Id.* at 16a. Likewise, although petitioner alleged a breach of contract, Lucent claimed no knowledge of any contract with petitioner. *Id.* at 17a. The panel explained that, under those circumstances, it might not be necessary to reach the question of whether petitioner's claims could proceed in light of the state secrets privilege. *Id.* at 17a-18a. There is no reason for this Court to review that interlocutory decision.

For similar reasons, it would also be premature to consider petitioner's assertion (Pet. 29) that petitioner will be "hindered" in identifying its alleged trade secret because of the district court's protective order relating to use of the coupler for or by the government. In any event, to the extent petitioner is unable to establish the existence of a trade secret or contract without implicating a state secret, dismissal of the complaint would be the proper remedy. See Pet. App. 31a-33a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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